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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-6266

JOHN CHARLES LESKO, Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA and
LeROY S. ZIMMERMAN, ATTORNEY GENERAL
OF PENNSYLVANIA, Respondents

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF ISSUES

I. SYMPATHY IS NOT A MITIGATING FACTOR UNDER THE PENNSYLVANIA DEATH PENALTY STATUTE NOR DOES LOCKETT V. OHIO, 438 U.S. 586 REQUIRE OR EVEN SUGGEST SUCH A RESULT.

II. NEITHER THE REQUIREMENT THAT THE DEFENDANT PROVE MITIGATING CIRCUMSTANCES BY A PREPONDERANCE OF THE EVIDENCE NOR THE REQUIREMENT THAT THE JURY MUST SENTENCE THE DEFENDANT TO DEATH UPON A FINDING OF ONE AGGRAVATING CIRCUMSTANCE AND NO MITIGATING CIRCUMSTANCES IS IN VIOLATION OF LOCKETT V. OHIO, 438 U.S. 586 (1977).

I. SYMPATHY IS NOT A MITIGATING FACTOR UNDER THE PENNSYLVANIA DEATH PENALTY STATUTE NOR DOES LOCKETT V. OHIO, 438 U.S. 586 REQUIRE OR EVEN SUGGEST SUCH A RESULT.

The defendant has redefined sympathy to be a mitigating factor which it is not. (See 42 Pa. C.S.A. §9711). At no time did the prosecutor or the trial court allude to Lesko's evidence about his troubled youth when they refered to sympathy. Clearly the evidence offered by Lesko that

(1) he had never known a person he could call father [N.T. 1653];

(2) when he was about five years old, some older kids set him on fire [N.T. 1652], and;

(3) "he lived in hell from day one" [N.T. 1649].

was an attempt to establish the existance of mitigating factor No. 8 under the Pennsylvania Death Penalty Statute viz. any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense. See Pa. C.S.A. §9711. This is required by Lockett v. Ohio, 438 U.S. 586 (1977).

The trial court's charge about sympathy

> Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision -- into a decision imposing the death sentence, or could improperly sway you against the decision imposing the death sentence. . . . Sympathy is not an aggravating circumstance; it is not a mitigating circumstance. [N.T. 1706].

and the reference in prosecutor's closing argument about sympathy

> "But I have a problem. Each one of you promised me, promised the judge, Mrs. Ambrose, Mr. Bertani, Mr. McCormick, Mr. Marsh and the defendants, when we started, that you would follow the law. You all promised that you wouldn't become a social activist. But I can't stop that. I can't stop you from walking out into that deliberation room after the judge charges you and saying to yourself, The Commonwealth has proved one or more aggravating circumstances, and there's no

> mitigating circumstances here at all, and the law says I must find these defendants and sentence them to death, but I won't do that, because I feel sympathy. And I also can't stop you from saying, well, I found one or more aggravating circumstances that have been proven beyond a reasonable doubt, and although I found mitigating circumstances, the aggravating circumstances outweigh them, and the law says that I must return a death penalty, but I won't, I'm going to show sympathy. I just can't stop you from doing that." [N.T. 1701]

were designed to take out of the case what the defendants had improperly put into it. This was a joint trial and both the defendant (John Charles Lesko) and his co-defendant (Michael Jay Travaglia) had been found guilty of murder in the first degree and the jury was hearing evidence in both cases.

Specifically the defendants themselves had attempted to cloud the issues by the following: Bernard Travaglia and Judith Travaglia, the parents of the co-defendant Michael Jay Travaglia both testified [N.T. 1594-1597] and both cried and sobbed in front of the jury; the final statement from Mrs. Travaglia being ". . . He's my son. I don't want him to die." [N.T. 1597] Mrs. Travaglia was extremely emotional, almost hysterical, at this point and that fact is reflected in the prosecutor's closing argument:

> "You saw something yesterday afternoon which visibly shook every one of you. And if it hadn't, would have surprised me. And I feel that every one of you were filled with compassion. I was. But you're not here to decide this issue on sympathy. Sympathy is not a mitigating circumstance. When you think about sympathy, you have to feel and know that there are other people whose hearts have been heavy for a long time, since January 3, 1980. Consider the law, consider the evidence, and make a decision. [N.T. 1690].

Also the defendant's closing arguments made reference to subjects that were not part of the jury's function as did the closing argument of his co-defendant. Both of these closing arguments relied on two basic premises: (1) the

death penalty is inherently wrong and (2) the arousal of the jury's sympathy by inflamming them as to the nature of the death penalty as it is carried out:

EG. Defendant Lesko's Closing:

". . . It's a death that is planned by the state for months, and its the kind of death that the condemned man waits for months to endure. Usually in terror. . ." [N.T. at 1665]

". . . And consider, with your knowledge of history, whether or not the death penalty was an instrument for the cure, the alleged cure of the social ills of the time which were many. That is expediency, not the law. . . " (emphasis added) [N.T. at 1666]

". . . Now, something else cured those social ills of the seventeenth and eighteenth centuries; it was not the death sentence. . . " [N.T. at 1667]

". . . if you return a verdict of death against John, you'll be saying the equivalent that we don't buy the doctrine that there is some good in every one of us that should be preserved, and if there is some good in someone it shouldn't make any difference. . . " [N.T. at 1672]

Defendant Travaglia's Closing:

". . . If the killing of Michael Travaglia can bring back those people, then there would be a legitimate reason for killing Michael Travaglia. . . " [N.T. at 1677]

". . . two wrongs don't make a right . . . " [N.T.at 1697]

". . . other states don't have a death penalty - have they found out something more than we know. . . " [N.T. at 1680]

". . . thou shalt not kill . . . " [N.T. at 1683]

". . . some glorious day we're going to take Michael Travaglia out, and we're going to shave his head, we're going to put grease on his arms, we're going to strap him into an electric chair, and we're going to send all those volts through his body until his feet split open and his fingers split open, and he dies, and he's electrocuted. . . " [N.T. at 1678]

The testimony set forth above and the defendants' closing arguments were designed to arouse sympathy not to prove a mitigating circumstance. They have nothing whatsoever to do with the character and record of the defendant nor the circumstances of his offense. This evidence of mitigation was offered and admitted into evidence and was not short-circuited in any way by the court's instruction concerning sympathy. The Petition for Certiorari should be denied.

II. NEITHER THE REQUIREMENT THAT THE DEFENDANT PROVE MITIGATING CIRCUMSTANCES BY A PREPONDERANCE OF THE EVIDENCE NOR THE REQUIREMENT THAT THE JURY MUST SENTENCE THE DEFENDANT TO DEATH UPON A FINDING OF ONE AGGRAVATING CIRCUMSTANCE AND NO MITIGATING CIRCUMSTANCES IS IN VIOLATION OF LOCKETT V. OHIO, 438 U.S. 586 (1977).

a.) The specific issue raised by the defendant was addressed by the Supreme Court of the United States in the case of Keith Zettlemoyer v. The Commonwealth of Pennsylvania, 82-6514 and on May 31, 1983 the Court denied Certiorari.

b.) The Pennsylvania Death Penalty Statute 42 Pa. C.S.A. §9711 does require that the jury's "verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance. . . and no mitigating circumstances, or one or more aggravating circumstances which outweigh any mitigating circumstances". This is clearly a mandatory rule, but it in no way prevents the jury from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense offered in mitigation. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 98 S.Ct. 2954 (1978). The Court in Lockett v. Ohio, supra. found the Ohio Death Penalty Statute infirm under the Eighth and Fourteenth Amendments of the Federal Constitution because the Ohio Statute did not permit evidence relative to the defendant's character and record, and to circumstances of the offense (e.g. the fact that the defendant's participation in the homicidal act was relatively minor) unless they were in some way directly related to one of three enumerated mitigating circumstances. Lockett v. Ohio, at 438 U.S. 608. All of the cases cited by the defendant involved situations where mandatory death penalty statutes have been stricken down by the Supreme Court. Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976); Roberts v. Lousiana, 428 U.S. 906, 49 L.Ed.2d 1213, 96 S.Ct. 3214 reh. den. 429 U.S. 890, 50 L.Ed.2d 174, 97 S.Ct. 248 (1976); Roberts v. Louisiana, 431 U.S. 633, 52 L.Ed.2d 637, 97 S.Ct.

1993 (1977). Each of the Statutes set forth in the cases cited above merely define a specific crime or crimes and then made the death sentence mandatory. These statutes did not provide any standards or guidelines for the jury to follow in arriving at a proper sentence. There is no case which says any mandatory death sentence is unconstitutional, certainly Lockett v. Ohio, supra., does not so hold.

It is the province of the Legislature to determine what circumstances may be considered in mitigation during a sentencing hearing. Patterson v. New York, 423 U.S. 198, 53 L.Ed.2d 284 (1977); Lockett v. Ohio, supra. In Pennsylvania, the Legislature has set forth in detail various mitigating factors and it is these factors which make the Pennsylvania death penalty statute entirely different from those statutes which have been declared unconstitutional. The challenged Pennsylvania statute lists the following mitigating circumstances:

1. The defendant has no significant history of prior criminal convictions.

2. The defendant was under the influence of extreme mental or emotional disturbance.

3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

4. The age of the defendant at the time of the crime.

5. The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under §309 (relating to duress), or acted under the substantial domination of another person.

6. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

7. The defendant's participation in the homicidal acts was relatively minor.

8. Any other evidence of mitigation concerning the character and record of the defendant in circumstances of his offense. See 42 Pa. C.S.A. §9711.

Not only does the Pennsylvania statute permit the jury to consider circumstances of the type which the Ohio statute made no provision for, (see Lockett, supra.) the Pennsylvania statute leaves within the sole province of the jury the weight to be given the mitigating circumstances, once they have been offered by the defendant. A Pennsylvania jury cannot impose the death sentence without first considering the aggravating and mitigating circumstances, including those which relate to the character and record of the defendant and the circumstances of the offense in question. Even more important, a Pennsylvania jury cannot impose a death sentence even under the mandatory aspects of the Pennsylvania statute without first finding that there were no mitigating circumstances. No death penalty statute similar to the current Pennsylvania statute has ever been determined to be violative of either the Eighth or Fourteenth Amendments of the Federal Constitution or the Pennsylvania Constitution, nor does the defendant cite any case so holding.

CONCLUSION

The Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,

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